

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA LEAANN KLEINE,

Defendant-Appellant.

UNPUBLISHED

March 31, 2009

No. 284221

St Joseph Circuit Court

LC No. 07-014438-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of failure to stop at the scene of an accident resulting in serious impairment of body function, MCL 257.617. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Frieda Borkholder and her children were riding in a horse and buggy driven by her husband when defendant approached at a high rate of speed and sideswiped the buggy. Defendant allegedly backed up slightly and put her head out the window, but then left the scene. Frieda Borkholder's ankle was broken in two places. She underwent surgery, spent two days in the hospital, and needed six to eight weeks for her ankle to heal. She testified that she continued to experience difficulty when using stairs.

During trial, defendant challenged whether the extent of Frieda's injuries were so extensive as to constitute serious impairment. MCL 257.58c. Defendant requested that the trial court give a necessarily lesser included instruction on the offense of failure to stop at the scene of an accident resulting in personal injury, MCL 257.617a. The trial court gave the instruction over the prosecution's objection, and read the following single instruction for both offenses:

The defendant is charged with failing to stop after an accident involving serious impairment of a body function or personal injury. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First: That the Defendant of the--was the driver of a motor vehicle.

Second: That the motor vehicle driven by the Defendant was involved in an accident.

Third: That the Defendant knew or had reason to know that she had been involved in an accident on a public road, or on any property open to travel by the public.

Fourth: That the accident resulted in a serious impairment of a body function or personal injury to another.

Fifth: That the Defendant failed to immediately stop her motor vehicle at the scene of the accident in order to render assistance and give information as required by law. The requirement that the driver immediately stop means that the driver must stop and park the car as soon as practical and reasonable under the circumstances, and without obstructing traffic more than is necessary.

Serious impairment of a body function has been defined by the statute and it includes, but is not limited, to more than one of the following:

Loss of a limb or loss of the use of a limb. Loss of a foot, hand, or finger, or thumb, or loss of a foot--loss of use of a foot, hand, finger, or thumb. Loss of an eye or ear, or loss of use of an eye or ear. Loss of [sic] substantial impairment of a bodily function. Serious visible disfigurement. A comatose state that lasts for more than three days. Measurable brain or mental impairment. A skull fracture or other serious bone fracture. Subdural hemorrhage or subdural hematoma, loss of an organ.

The trial court informed the jury that it could consider two crimes. The jury should first consider the crime of leaving the scene of an accident involving a serious impairment of a body function. If the jury agreed that defendant was guilty of that crime, the jury could stop its discussions and return a verdict. If the jury could not agree, it was then to consider the lesser crime of leaving the scene of an accident involving personal injury. The trial court informed the jury that it could return to the more serious charge if it chose to do so. The trial court discussed the verdict form and told the jury that it could return one of three verdicts: guilty of the greater charge, guilty of the lesser charge, or not guilty. When asked whether counsel had any objections to the instructions, defense counsel indicated that he did not.

Defendant now argues that this blended instruction, which is modeled on the recent version of CJI2d 15.14, was insufficient under the circumstances to delineate the lesser included offense of failure to stop causing personal injury from the more serious crime.

A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defendant admits that counsel waived this claim of error by agreeing to the instructions as given, but argues that defense counsel's waiver of any claim of error constituted ineffective assistance of counsel.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective

assistance claim, then he has effectively waived the issue.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing on this ground before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A court first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

Trial counsel’s decision to not challenge the instruction did not constitute ineffective assistance. We review jury instructions as a whole, rather than piecemeal. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Although an instruction may be somewhat imperfect, “there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* Here, defendant argues that the initial blended jury instruction was confusing, and could be read to allow the jury to find her guilty of the greater charge even if the jury determined that Frieda Borkholder suffered a bodily injury that was less severe than that necessary to support a conviction for the greater charge. However, the trial court clearly delineated the two possible offenses when it stated that the jury could consider two crimes, explained that one involved serious impairment of a body function and the other involved only personal injury, and provided the definition of serious impairment. The jury verdict form also clearly differentiated between the two offenses, and specifically described leaving the scene of an accident involving personal injury as a lesser offense. As a whole, the jury instructions fairly presented the issues to the jury. Thus, we find that trial counsel did not provide objectively unreasonable representation when he did not object to the instructions. Nor can defendant show that, had counsel requested further clarification of the jury instructions, the outcome of the trial would likely have been different.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto